166-707

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 199.

SALT LAKE CITY, PLAINTIFF IN ERROR,

vs.

ELIZABETH B. TUCKER AND SAMUEL J. TUCKER.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED DECEMBER 10, 1894.

(15,746.)

GUILD

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1 Supreme Court, Territory of Utah.

Filed January 2, 1894. Jos. P. Bache, clerk.

SALT LAKE CITY, Appellant,
vs.
ELIZABETH B. TUCKER *et al.* } 455.

In the District Court in and for the Third Judicial District of Utah Territory, County of Salt Lake.

ELIZABETH TUCKER and SAMUEL S. TUCKER, Her Husband, Plaintiffs,
vs.
SALT LAKE CITY, a Corporation of Utah Territory, Defendant. } Amended Complaint.

The plaintiffs complain and allege:

I. That the defendant is a municipal corporation duly organized under the laws of this Territory.

II. That, among other things, it is by its charter made its duty to keep the streets and sidewalks in said city in good order, so that they shall at all times be in a safe and proper condition for the use of the people of said city.

III. That that certain street known as Third South street, between Main street and West Temple street, was and is a common thoroughfare in said city, and used by the citizens thereof and others, and that the duty of said defendant as to said street and the sidewalks thereon was and became at the time hereinafter mentioned a matter of public and general concern.

IV. That on or about the first day of August, 1890, in front of the livery stable formerly known as McKinnon's stables, on
2 the north side of said street and between Main or East Temple street and West Temple street, and within said city, the said corporation made, constructed, and caused to be put down an iron and glass and cement sidewalk, a portion of which was negligently, wilfully, and knowingly constructed in a sharp incline, making a steep and slippery descent, dangerous to all passers-by, and ever since said date has maintained said sidewalk as aforesaid constructed; that ever since said date the said sidewalk has remained as aforesaid constructed, the said corporation having at all times full knowledge and notice of its dangerous construction and condition.

V. That the plaintiff Elizabeth B. Tucker, on the 8th day of March, 1892, was lawfully passing along said sidewalk and was wholly unaware of danger, and, stepping on said sharp incline, without fault or negligence on her part, was violently thrown upon the said sidewalk, whereby she received great bodily injury, to wit, a broken arm, was made sick and sore, was thereby kept to her bed, was unable to perform her usual duties as mistress of her house, and in con-

sequence thereof was compelled to spend three hundred dollars for medical attendance and nursing, and by reason of said injury endured great distress to body and mind, and the usefulness of said arm has been permanently impaired and injured, to her damage in the sum of forty-five hundred dollars.

Wherefore plaintiffs pray judgment against the said defendant for the sum of three hundred dollars expended for medical attendance and nursing, and for the further sum of forty-five hundred dollars for the further injuries as above set forth, and for costs of suit.

FRANK B. STEVENS,
Attorney for Plaintiff.

3 TERRITORY OF UTAH, } ss:
County of Salt Lake, }

Elizabeth B. Tucker, being first duly sworn, upon oath deposes and says that she is one of the plaintiffs in the above-entitled action; that she has read the foregoing amended complaint and knows the contents thereof, and knows that the matters therein stated are true, except as to those matters therein stated on information and belief, and as to such matters she believes them to be true.

ELIZABETH B. TUCKER.

Subscribed in my presence and sworn to before me this 20th day of May, A. D. 1893.

HARRY G. McMILLAN, *Clerk,*
[SEAL.] By GEO. D. LOOMIS, *Deputy.*

Endorsed: #10750. Title court and cause. Amended complaint. Filed May 20, 1893. Henry G. McMillan, clerk, by Geo. D. Loomis, deputy. Frank B. Stephens, pl'ffs' att'y.

4 In the District Court of the Third Judicial District, Territory of Utah.

ELIZABETH B. TUCKER and SAMUEL J. TUCKER, Plaintiffs,
vs.
SALT LAKE CITY, Defendant. } Answer.

Comes now the above-named defendant and, for answer to the complaint filed herein, *and* denies:

First. That it is made the duty of said defendant by its charter to keep the streets and sidewalks in good order, so that they shall at all times be in a safe or proper condition for the use of the people of the city.

Second. That on or about the first day of August, 1890, or at any other time or at all, in fron- of the livery stable familiarly known as "McKinmon's stable," on the north side of said Third South street, or at any time or place, the said city made, constructed, or caused to be put down an iron or glass or cement walk, or any sidewalk whatever, or that if a sidewalk was constructed at said place,

denies that said defendant had anything to do with the construction of the same or any part thereof.

Third. Denies that said plaintiff, Elizabeth B. Tucker, on the 8th day of March, 1892, or at any other time, was unaware of danger, or that she slipped upon said alleged incline without fault
5 or negligence on her part.

Fourth. As to the allegation that said plaintiff, Elizabeth B. Tucker, was violently thrown upon said sidewalk, and that she received great injury, this defendant has no sufficient information or belief to enable it to answer said allegations. It therefore denies that said plaintiff was violently or otherwise thrown upon said or any sidewalk, or that she received great or any injury or a broken arm, or was made sick or sore or kept her bed, or was unable to perform her duties as mistress of her house.

Fifth. Denies on information and belief that said defendant, Elizabeth B. Tucker, was compelled to or did spend three hundred dollars or any other sum for medical attendance and nursing or for either medical attendance or nursing.

Sixth. Denies that by reason of any act or acts of this defendant that said plaintiff, Elizabeth B. Tucker, has suffered pain or distress to body or mind, or that the use of her arm has been permanently impaired or injured or at all.

Seventh. Denies that said *defendant* or either of them have been damaged in the sum of three thousand dollars or in any other sum whatever by reason of any act or acts of the said defendant.

Wherefore said defendant prays to be hence dismissed with its reasonable costs and charges in this behalf expended.

E. D. HOGE,
City Attorney.

6 TERRITORY OF UTAH, } ss:
Salt Lake County, }

R. N. Baskin, being duly sworn, deposes and says that he is the mayor of Salt Lake City, the above-named defendant; that he has heard read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

R. N. BASKIN.

Subscribed and sworn to before me this 26th day of July, 1892.

J. L. MAY,
[SEAL.] *Notary Public.*

My commission expires April 14th, 1893.

Endorsed: # 10750. Title court and cause. Answer. Received copy of the within this 27th day of July, 1892. Stephens & Schroeder, att'ys for plaintiffs. Filed July 27th, 1892. Henry G. McMillan, clerk, by Geo. D. Loomis, deputy. E. D. Hoge, city att'y.

7 In the District Court for the Third Judicial District of Utah Territory.

ELIZABETH B. TUCKER *et al.*, Plaintiffs,
vs.
SALT LAKE CITY, Defendant.

This case coming on regularly for trial, *and* Frank B. Stephens and B. X. Smith appear as attorneys for plaintiff and E. D. Hoge appears as attorney for defendant, and a jury of twelve persons is impaneled and sworn to try said case, to wit, C. M. Hammond, Henry Anderson, W. J. Moore, James Ashman, Wm. J. Crowther, James R. Miller, John T. Lynch, H. Y. Shurtliff, E. A. Visser, John Chalmers, Thomas Carter, and F. H. Taylor. The plaintiff is allowed to amend complaint against the objection of the defendant. A. T. Doremus, F. A. Hale are sworn and testify as witnesses for the plaintiff, and the plaintiff is allowed to further amend complaint against the objection of the defendant, and Lew. Johnson, Elizabeth B. Tucker, John Butterworth, Frank Foster, Miss Tucker, and Mrs. Foster are sworn and testify on behalf of the plaintiff, and the further trial adjourned until tomorrow.

Dated May 19th, A. D. 1893.

8 In the District Court for the Third Judicial District of Utah Territory, Salt Lake County.

ELIZABETH B. TUCKER *et al.*
vs.
SALT LAKE CITY.

The attorneys for parties and jurors impaneled in the case are present and the trial herein is resumed. Dr. I. White, W. T. Neslin, and Dr. J. M. Dart are sworn and testify as witnesses for the plaintiff, and the evidence closes; case argued by counsel and the court instructs the jury and the jury retires to consider of their verdict. Subsequently the jury returns into court and say they find and present the following verdict by nine jurors, to wit:

"We, the jurors impaneled in the above case, find the issues for the plaintiff and assess her damages at the sum of two thousand dollars ($2,000).

E. M. HAMMOND, *Foreman.*

And by 8 other jurors."

And the defendant excepts to receiving the verdict of nine jurors, and it is ordered that judgment be entered herein in favor of the plaintiff and against said defendant for said sum of $2,000.00, together with said plaintiff's costs herein incurred, and taxed at $95.35.

Judgment entered in Judgment Book L.

Dated May 20th, A. D. 1893.

9 In the District Court of the Third Judicial District, Territory of Utah, County of Salt Lake.

ELIZABETH B. TUCKER *et al.*, Plaintiff-,
vs.
SALT LAKE CITY, Defendant. } Verdict.

We, the jurors impaneled in the above case, find the issues for the plaintiff and assess the damages at the sum of two thousand dollars ($2,000.00).

EDWARD A. VISSER.
L. T. SHURTLIFF.
JOHN CHALMER.
J. H. TYLER.
H. ANDERSON.
JAMES ASHMAN.
WILLIAM J. CROWTHER.
JOHN T. LYNCH.
C. M. HAMMOND.

Dated May 20th, 1893.

C. M. HAMMOND, *Foreman.*

Filed May 20th, 1893.

HENRY G. McMILLAN, *Clerk.*

10 District Court of the Third Judicial District, Territory of Utah, County of Salt Lake.

ELIZABETH B. TUCKER and SAMUEL S. TUCKER, Plaintiff-,
vs.
SALT LAKE CITY, a Corporation of Utah Ty., Defendant. } Judgment on Verdict.

This action came on regularly for trial. The said parties appeared by their attorneys. A jury of twelve persons was regularly impaneled and sworn to try said action. Witnesses on the part of plaintiff and defendant were sworn and examined. After hearing evidence, the argument of counsel, and instructions of the court, the jury retired to consider of their verdict, and subsequently returned into court and, being called, answered to their names and say they find a verdict for the plaintiff as follows, to wit:

We, the jurors impaneled in the above case, find the issues for the plaintiff and assess *his* damages at the sum of two thousand dollars ($2,000.00).

EDWARD A. VISSER.
H. T. SHURTLIFF.
H. ANDERSON.
JAMES ASHMAN.
JOHN T. LYNCH and
C. M. HAMMOND, *Foreman.*
JOHN CHALMERS.
R. H. TAYLOR.
WILLIAM J. CROWTHER.
C. M. HAMMOND.

Dated May 20th, 1893.

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged, and decreed that said plaintiff have and recover from said defendant the sum of two thou-
11 sand dollars, with interest thereon, at the rate of eight per cent. per annum, from the date hereof till paid, together with

said plaintiff's costs and disbursements incurred in this action, amounting to the sum of ninety-five & $\frac{35}{100}$ dollars.

Judgment entered May 20th, A. D. 1893.

Endorsed: #10750. Title court and cause. Judgment on verdict. Filed May 20th, 1893. Henry G. McMillan, clerk, by Geo. D. Loomis, deputy.

12 In the District Court of the Third Judicial District, Territory of Utah.

ELIZABETH B. TUCKER and SAMUEL S. TUCKER, Her Husband, Plaintiffs,
vs.
SALT LAKE CITY, Defendant.

To Frank B. Stephens and Ben. X. Smith, attorneys for plaintiff:

, Take notice that defendant, Salt Lake City, intends to move the court to vacate and set aside the verdict rendered in the above cause and to grant a new trial of said cause upon the following grounds, to wit:

1st. Errors in law occurring at the trial and excepted to by the defendant, to wit:

The court erred in this, in permitting witnesses other than the plaintiff to testify before the jury that they had seen other persons fall at the same place on the sidewalk where the plaintiff claims to have fallen and by permitting other witnesses — before the jury that they themselves had fallen at or near the same place where the plaintiff claims she fell.

The court erred in refusing to give to and charge the jury as requested by the defendant in instructions asked numbered 1st, 2nd, 3rd, 4th, 5th, 6th, and 7th.

The court erred as follows, in paragraph- marked "*a*," "*b*," and "*c*:"

a. You are further charged that if you believe from a pre-
13 ponderance of the evidence that the city permitted this dangerous sidewalk, as alleged in the complaint, to remain in this street after the city officers, whose duty it was to repave the streets, knew of it or should have known of it in the use of reasonable diligence, and if you further believe that the plaintiff, without fault on her part and with the use of *the* care, while walking along the street stepped upon this incline, as described in the complaint read to you, and was thrown down and suffered injury as alleged, then you must find for the plaintiff.

b. On the contrary, the court charged you that it was the duty of the plaintiff to use ordinary care in passing along the street to see and observe any dangerous place on the street, and if you believe from a preponderance of the evidence that she was guilty of negligence in stepping on such dangerous place, if you believe from the evidence it was — which contributed to the injury, then she cannot recover.

c. It is your province to determine from all the evidence, in the first place, whether the danger existed and whether the city had notice of it, as to whether it was dangerous to persons walking along with ordinary care, and as to whether the plaintiff used reasonable care.

Said motion will be made upon a statement of the case hereinafter to be prepared.

E. D. HOGE, *City Att'y.*

Endorsed: #10750. Title court and cause. Notice of motion. Rec'd copy of within this 26th day of May, 1893. Frank B. Stephens, att'y for pl'ff. Filed May 26th, 1893. Henry G. McMillan, clerk, by Geo. D. Loomis, deputy. E. D. Hoge, city att'y.

14 In the District Court for the Third Judicial District of Utah Territory, Salt Lake County.

ELIZABETH B. TUCKER *et al.*
vs.
SALT LAKE CITY.

On motion of E. D. Hoge, Esq., attorney for the defendant, it is ordered that the defendant be, and is hereby, allowed until and including June 20th, 1893, to file and serve statement on motion for a new trial herein.

Dated June 3rd, 1893.

15 In the District Court for the Third Judicial District of Utah Territory, Salt Lake County.

ELIZABETH B. TUCKER *et al.*
vs.
SALT LAKE CITY.

On motion of E. D. Hoge, attorney for the defendant, it is ordered that defendant be, and is hereby, allowed until and including July 2nd, 1893, to file the statement on motion for a new trial herein.

Dated June 19th, A. D. 1893.

16 In the District Court for the Third Judicial District of Utah Territory, Salt Lake County.

ELIZABETH B. TUCKER *et al.*
vs.
SALT LAKE CITY.

On motion of E. D. Hoge, attorney for the defendant, it is ordered that the defendant be, and is hereby, allowed until and including July 15th, 1893, to prepare and serve statement on motion for a*n* new trial herein.

Dated July 1st, A. D. 1893.

17 In the District Court for the Third Judicial District of Utah Territory.

ELIZABETH B. TUCKER, Plaintiff,
vs.
SALT LAKE CITY, Defendant.

The motion of the defendant for a new trial herein is now submitted by Stephens & Smith, attorneys for plaintiff, upon the statement and record filed herein, and it appearing that the judgment herein is sustained by the law and the evidence, and that no error appears sufficient to warrant allowance of a new trial, it is ordered that said motion be, and the same is hereby, overruled.

Defendant excepts.

Dated November 4th, A. D. 1893.

18 In the District Court of the Third Judicial District, Territory of Utah, County of Salt Lake.

ELIZABETH B. TUCKER *et al.*, Plaintiff-,
vs.
SALT LAKE CITY, Defendant.
Notice of Appeal.

You will please take notice that the defendant in the above-entitled action hereby appeals to the supreme court of the Territory of Utah from the judgment therein made and entered in the said district court on the 20th day of May, 1893, in favor of the plaintiff Elizabeth B. Tucker in said action and against the said defendant and from the whole thereof, and also from the order denying said defendant's motion for a new trial made and entered in the minutes of said court the fourth day of November, 1893.

Respectfully yours,
E. D. HOGE,
Att'y for Def't.

Dated 29th day of December, 1893.

To the above-named plaintiff and to Frank B. Stephens and Ben. X. Smith, her attorneys.

Endorsed: #10750. Title court and cause. Notice of appeal. Filed December 29, 1893. Henry G. McMillan, clerk, by Geo. D. Loomis, deputy. Rec'd copy of the within Dec. 29, 1893. Frank B. Stephens, att'y for pl'ff. E. D. Hoge, att'y for def't.

19 TERRITORY OF UTAH,
County of Salt Lake, } *ss:*

In the District Court of the Third Judicial District.

ELIZABETH B. TUCKER, Plaintiff,
vs.
SALT LAKE CITY, Defendant.

The above-entitled action came on for trial at the court-rooms of the third judicial district, at Salt Lake City, Utah, before the Hon. S. Zane and jury, commencing Friday afternoon, May 19th, 1893.

Appearances.—For plaintiff: Frank B. Stephens, Esq., Benner X. Smith, Esq.; for defendant: E. D. Hoge, Esq.

Testimony omitted.

20 *Charge to the Jury.*

GENTLEMEN OF THE JURY: This is an action by the plaintiff against the defendant to recover damages in consequence of an injury to her, as alleged, caused by the negligence of the city of Salt Lake. The allegation is that on the north side of Third South street between West Temple and Main street- the defendant constructed and caused to be put down an iron, glass, and cement sidewalk, a portion of which was negligently and knowingly constructed in a sharp incline, making a steep and slippery de-cent, dangerous to persons passing upon the street, on the sidewalk, and ever since that time the city has maintained the sidewalk as aforesaid, and that ever since the sidewalk has remained as it was constructed, said corporation having at all times knowledge and notice of its dangerous construction and condition. The plaintiff alleges further that on the 8th day of March, 1892, as she was passing along the sidewalk, exercising due care, she stepped upon this sharp incline, and without her fault she was thrown to the pavement and received great bodily injury.

The defendant has put in an answer denying the allegations as to negligence on the part of the city, and the burden of proof is upon the plaintiff to show by a preponderance of the evidence the negligence charged in the complaint.

The court charges you that it was the duty of the city to use all reasonable care to keep and maintain the sidewalk in a reasonably safe condition to persons passing upon it, and if the city knowingly failed to do so it is chargeable with negligence.

21 Though there may not be any actual notice to the city or any of its authorized officers, whose duty it is to repair the sidewalks and to remedy dangerous places, yet if you believe from a preponderance of the evidence that the danger had remained there such a length of time that the city's officers whose duty it was to examine sidewalks and repair them, in the use of reasonable diligence, should have discovered the danger, then you have a right to infer notice to the city.

You are further charged that if you believe from a preponderance of the evidence that the city permitted this dangerous sidewalk, as alleged in the complaint, to remain in this street after the city's officers whose duty it was to repair the streets know of it or should have known of it in the use of reasonable diligence, and if you further believe that the plaintiff, without fault on her part and with the use of due care, while walking along the street stepped upon this incline as described in the complaint read to you and was thrown down and suffered injury as alleged, then you should find for the plaintiff.

On the contrary, the court charges you that it was the duty of the plaintiff to use ordinary care in passing along the street to see and

observe any dangerous places in the street, and if you believe from a preponderance of the evidence that she was guilty of negligence in stepping on such dangerous place—if you believe from the evidence it was that which contributed to the injury—then she cannot recover.

It is your province to determine from all the evidence, in the first place, whether the danger existed and whether the city had notice of it, as to whether it was dangerous to persons walk-
22 ing along with ordinary care, and as to whether the plaintiff used reasonable care.

You are the judges, gentlemen of the jury, of the credibility of the witnesses who have testified before you, and in judging of their credibility you have a right to take into consideration their deportment upon the witness stand—their apparent frankness or candor or the want of it—the motives they may have to testify truly or falsely, and, in fact, you have a right to take into consideration any fact in evidence which, in your judgment, affects the credibility of any witness.

In weighing the evidence you should consider it all together; consider it reasonably, impartially, and fairly; draw such reasonable inferences from the facts stated as you think you are entitled to. You are the judges of the facts.

If you find the issues for the plaintiff, you will assess her damages at such an amount as you think will compensate her for the injury. In assessing the damages you may take into consideration the extent of the injury—whether permanent or otherwise. You have a right to take into consideration any physical and mental pain caused by the injury; also any amount she may have paid out for medicines and medical attendance and treatment.

If you find a verdict for the plaintiff, you will state in your verdict the amount that you find. If you find the issues for the defendant, you will so state in your verdict.

Mr. STEPHENS: May it please the court, I desire to state, in regard to our estimate of damages, that I have presented an instruction
23 I took from Jones on Negligence. I have not listened attentively on that point. I didn't hear it.

The COURT: I stated they should give the plaintiff such an amount as will compensate her for the injury; that in assessing the damages they had a right to take into consideration the extent of the injury, whether permanent or temporary, and also any physical pain or mental anguish she may have suffered by reason of the injury, and any necessary expenditures to be cured. I don't think the jury misunderstood me on that point.

Mr. HOGE: There is one point I omitted in my instructions. I would like your honor to instruct in your own language, if you feel disposed to instruct upon it, if they should find for the plaintiff they can take into consideration her age. The rule of law is, as I understand it, that statistics may be introduced in evidence, while there were none given in evidence here, that the same extent of an injury in her case, a person of her age, the damages cannot be so high as in a younger person; that is the idea.

The COURT: Of course they may take into consideration the age of the plaintiff and all the circumstances in evidence.

Mr. HOGE: It is considered that the instructions given are excepted to.

The COURT: If there is any oversight you might call attention to it.

Mr. HOGE: I don't know of any or don't think of any now. I just reserve the right to consider them excepted to. I don't know of anything I just can point out now.

Mr. STEPHENS: The same may be entered for us. There is
24 nothing I can think of now.

The defendant excepted to the ruling of the court refusing to give the instructions asked by the defendant.

In the District Court of the Third Judicial District, Territory of Utah, County of Salt Lake.

ELIZABETH B. TUCKER *et al.*, Plaintiff-,
vs.
SALT LAKE CITY, Defendant. } Verdict.

We, the jurors impaneled in the above case, find the issue for the plaintiff and assess the damages at the sum of two thousand dollars ($2,000).

	EDWARD A. VISSER.	JAMES ASHMAN.
	H. T. SHURTLIFF.	WILLIAM J. CROWTHER.
25	JOHN CHALMERS.	JNO. T. LYNCH.
	P. H. TAYLOR.	C. M. HAMMOND.
	H. ANDERSON.	

Dated May 20th, 1893.

C. M. HAMMOND, *Foreman.*

Filed May 20th, 1893.

HENRY G. McMILLAN, *Clerk.*

Judgment on Verdict.

Title Court and Cause.

This action came on regularly for trial. The said parties appeared by their attorneys. A jury of twelve persons was regularly empaneled and sworn to try said action. Witnesses on the part of plaintiff and defendant were sworn and examined.

After hearing evidence, the argument of counsel, and instruction of the court, the jury retired to consider of their verdict, and subsequently returned into court, and, being called, answered to their names, and say they find a verdict for the plaintiff as follows, to wit:

We, the jurors impaneled in the above case, find the issues for the plaintiff, and assess her damages at the sum of two thousand and $\frac{00}{100}$ dollars ($2,000).

26	EDWARD A. VISSER.	JAMES ASHMAN.
	H. T. SHURTLIFF.	WILLIAM J. CROWTHER.
	JOHN CHALMERS.	JNO. T. LYNCH &
	P. H. TAYLOR.	C. M. HAMMOND.
	H. ANDERSON.	C. M. HAMMOND, *Foreman.*

Dated May 20th, 1893.

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged, and decreed that said plaintiff have and recover from said defendant the sum of two thousand dollars, with interest thereon at the rate of eight per cent. per annum from the date hereon till paid, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of ninety-five & $\frac{35}{100}$ dollars.

Judgment entered May 20th, A. D. 1893.

27 ELIZABETH TUCKER *et al.* *vs.* SALT LAKE CITY. } Assignment of Errors.

The defendant requests the court to charge the jury as follows:

The court erred in refusing to give the following instructions asked by the defendant:

1st. That it is the duty of the city to keep its streets and sidewalks in a reasonably safe condition for the use of the public, but this does not necessarily imply as a matter of law that the whole width of the street or sidewalk must be in good condition. If the sidewalk was in a reasonably safe condition for public use by travelers and there was sufficient width or space for the plaintiff Elizabeth Tucker to have passed along the sidewalk, by the use of ordinary care, without injury to herself, you must find for the defendant.

2nd. If you find from the evidence that the sidewalk where the plaintiff Elizabeth Tucker was injured was of sufficient width and in such safe condition that the said plaintiff, Elizabeth Tucker, by the use of ordinary care, could have avoided the injury complained of, you must find for the defendant.

3rd. If the plaintiff Elizabeth Tucker was not using ordinary care while passing over the sidewalk at the point where the injury was sustained, and at the time of the accident, but was walking in a careless or negligent manner and over ground with which she was unacquainted, the city would not be liable.

28 4th. The city is only bound to ordinary care in the keeping of its streets and sidewalks in a reasonable safe condition and cannot be held liable for any greater care.

5th. If you find from the evidence that the plaintiff Elizabeth Tucker was not at the time of the accident using reasonable or ordinary care to avoid the accident, she cannot recover in this action. In other words, she must, at the time the accident happened, have been free from negligence or carelessness on her part.

6th. The court further instructs you that if you should find from the evidence that the city was negligent in permitting the sidewalk to be and remain in the condition it was at the time and place where the accident happened, yet if you further find from the evidence that the said plaintiff, Elizabeth Tucker, was not at the time exercising ordinary care in passing over the sidewalk where the accident occurred and was herself guilty of negligence, the plaintiff cannot recover in this action.

7th. You are further instructed that the proper measure of dam-

age in cases of this character against the city is the actual damages sustained.

29 2nd. The court erred in this, in permitting witnesses to testify before the jury that they had seen other persons fall at the same place on the sidewalk where the plaintiff claims to have fallen, and in permitting other witnesses to testify to the jury that they themselves had fallen at or near the same place where the plaintiff claims she fell.

3rd. The court erred in giving the following instructions:

a. You are further charged that if you believe, from a preponderance of the evidence, that the city permitted this dangerous sidewalk, as alleged in the complaint, to remain in this street after the city officers whose duty it was to repair the streets knew of it or should have known of it in the use of reasonable diligence, and if you further believe that the plaintiff. without fault on her part and with the use of due care, while walking along the street stepped upon this incline, as described in the complaint read to you, and was thrown down and suffered injury as alleged, then you must find for the plaintiff.

b. On the contrary, the court charges you that it was the duty of the plaintiff to use ordinary care in passing along the street to see and observe any dangerous place in the street, and if you believe, from a preponderance of the evidence, that she was guilty of negligence in stepping on such dangerous place—if you believe from the evidence it was — which contributed to the injury—then she cannot recover.

c. It is your province to determine from all the evidence, in the first place, whether the danger existed and whether the city had notice of it as to whether it was dangerous to persons walk-

30 ing *walking* along with ordinary care and as to whether the plaintiff used reasonable care.

E. D. HOGE,
City Att'y and Att'y for Defendant.

This is to certify that the foregoing statement, on motion for new trial, is correct and agreed to by the respective counsel for the parties to this action.

September 1st, 1893.

F. B. STEPHENS,
B. X. SMITH,
Attorneys for Plaintiff.
E. D. HOGE,
Att'y for Defendant.

I hereby testify that the foregoing statement, on motion for new trial, is correct and the same is settled by me.

C. S. ZANE, *Judge.*

31 TERRITORY OF UTAH, } ss:
County of Salt Lake, }

I, Henry G. McMillan, clerk of the third judicial district court of Utah Territory, do hereby certify that the foregoing is a full, true, and correct copy of the original amended complaint, answer, minute-book entries of the trial May 19 and 20, 1893; verdict of the jury, judgment on verdict, notice of motion to set aside verdict and for a new trial, orders of court, June 3rd, June 19th, and July 1st, extending time to file statement on motion for new trial; order overruling motion for a new trial, and notice of appeal and statement on motion for new trial in the action therein entitled filed in my office.

Witness my hand and the seal of the said court, at Salt
[SEAL.] Lake City, this 30th day of December, A. D. 1893.

HENRY G. McMILLAN, *Clerk.*

32 In the Supreme Court of Utah Territory, Regular June Term.

THURSDAY, *June 7th*, 1894.

ELIZABETH B. TUCKER *et al.* }
vs.
SALT LAKE CITY, Appellant. }

This cause, coming on regularly for hearing, was argued by E. D. Hoge, Esq., and Ed. F. Coad, Esq., in behalf of appellant, by Benner X. Smith, Esq., in reply, and was submitted and taken under advisement.

33 In the Supreme Court of Utah Territory, Regular June Term.

TUESDAY, *June 12th*, 1894.

ELIZABETH B. TUCKER *et al.* }
vs.
SALT LAKE CITY, Appellant. }

This cause having been heretofore argued and submitted and the court being sufficiently advised thereon, it is now here considered, ordered, and adjudged that the judgment of the district court therein be, and the same is hereby, affirmed with costs.

34 In the Supreme Court of Utah Territory.

ELIZABETH B. TUCKER *et al.*, Respondents, }
vs.
SALT LAKE CITY, Appellants. }

MERRITT, *C. J.:*

This action was brought by plaintiff and her husband, who has since died, against the City of Salt Lake.

The complaint alleges that on or about the 1st day of August,

1890, in front of the livery stable formerly known as McKimmin's stables, on the north side of 3rd South street between Main and West Temple streets, the said city made, constructed, and caused to be constructed and put down and iron, glass, and cement sidewalk, a portion of which was negligently, wilfully, and knowingly constructed on a sharp incline, making a steep and slippery descent, dangerous, etc.

That plaintiff, when passing along said sidewalk, was unaware of danger, stepped in said incline, without fault or negligence on her part, was thrown upon the sidewalk and broke her arm, etc., for which damages were claimed in the sum of $4,500. The answer denied all the allegations of the complaint.

A trial was had before the court and a jury. The jury rendered a verdict in favor of plaintiff for the sum of $2,000, and judg-
35 ment was rendered by the court in favor of plaintiff for said sum and costs.

Defendant moved for a new trial, which was overruled; whereupon defendant appealed and assigned as error the failure of the court below to give certain instructions asked by defendant, and also excepted to the charge given by the court to the jury.

From a careful examination of the record we find no error. The charge of the court below was full and stated correctly the law of the case. The court charged the jury "that the defendant had put in an answer denying the allegations as to negligence on the part of the city, and the burden of proof is on the plaintiff to show by a preponderance of evidence the negligence charged in the complaint; that it was the duty of the city to use all reasonable care to keep and maintain the sidewalk in a reasonably safe condition to persons passing upon it; and if the city knowingly failed to do so, it is chargeable with negligence.

Though there may not be any actual notice to the city or any of its authorized officers whose duty it is to repair the sidewalks and remedy dangerous places, yet if you believe from a preponderance of evidence that the danger had remained there any leng-h of time, that the city officers whose duty it was to examine sidewalks and repair them in the use of reasonable diligence should have discovered the danger, then you have a right to infer notice to the city."

The court further instructed the jury that if they believed from a preponderance of the evidence that the city permitted this dangerous sidewalk, as alleged in the complaint, to remain in
36 the street after the city officers whose duty it was to repair the streets knew of it or should have known of it in the use of reasonable diligence, and if they further believed that the plaintiff, without fault on her part and with the use of due care, while walking along the street stepped upon the incline, as described in the complaint, and was thrown down and suffered injury as alleged, then that they should find for the plaintiff.

The court further charged the jury that it was the duty of the plaintiff to use ordinary care in passing along the street to see and observe any dangerous places in the street, and if they believed from a preponderance of the evidence that she was guilty of negli-

gence in stepping on such a dangerous place—if you believe from the evidence it was — which contributed to the injury—then she cannot recover.

The court further charged the jury that it was their province to determine from all the evidence, in the first place, whether the danger existed and whether the city had notice of it, as to whether it was dangerous to persons walking along with ordinary care and as to whether the plaintiff used reasonable care.

These charges, we think, fully and fairly stated the law of the case and were quite as favorable to the defendant as the law would justify.

We have examined the proposed instruction- asked by defendant and which were not given by the court—find that their substance was already given by the court in its charge, with the following exception, viz., the defendant asked the court to charge the jury that

37 "if you find from the evidence that the sidewalk where the plaintiff Elizabeth Tucker was injured was of sufficient width and in such safe condition that the said plaintiff, Elizabeth Tucker, by the use of ordinary care, could have avoided the injury complained of, you must find for defendant;" which the court refused to give, and which ruling was excepted to by defendant, and who now assigns the same as error.

The court properly refused to give said instruction because it was an assumption on the part of appellant that as a matter of law the whole width of the sidewalk need not be in good condition, and that a city is not compelled to keep the whole width of the sidewalk in good condition. That is not the law. "Where a city opens a sidewalk to public travel it is bound to keep every portion of it in repair."

Roe *vs.* City of Kansas, 13 S. W. Rep., 40.
Morrill on City Negligence, 67.
Bruso *vs.* Buffalo, 90 N. Y., 679.

All persons using streets and sidewalks have the right to assume that they are in good and safe condition and to regulate their conduct on that assumption.

Kenyon *vs.* Indianapolis, 1 Wilson, 139.
Gibbons *vs.* Phœnix, 15 N. Y. S., 410.
Hopkins *vs.* Ogden City, 5 Utah, 390.

The city engineer of the defendant corporation testified as follows: "I saw the sidewalk where the plaintiff fell when being constructed. I considered the slope too great for safety and know it has remained in the same condition as when constructed."

The defendant offered no testimony in the case.

We consider that the defendant corporation was guilty of
38 gross negligence.

The validity of a verdict by nine jurors has already been

sustained by the court and we adhere to our former ruling. There is absolutely no merit on this appeal.

The judgment is affirmed.

We concur:

MINER, *J.*
SMITH, *J.*
BARTCH, *J.*

38½ It is stipulated by and between plaintiff in error and defendant in error that the record to be certified up to the Supreme Court of the United States on the writ of error issued herein shall be, and the same is hereby, diminished and reduced, and that the foregoing transcript as certified shall be used and treated as the record in the action on said writ of error; and it is further stipulated and agreed that at the trial of said action evidence was introduced by both parties prior to the charge of the court to the jury and prior to the verdict returned; and it is further stipulated and agreed that this stipulation shall be considered as a part of the foregoing record herein on said writ of error.

The parties hereto subscribe their names by their attorneys, duly authorized.

SALT LAKE CITY,
Municipal Corporation in the Territory of Utah,
Plaintiff in Error,
By E. D. HOGE,
City Attorney for said City and Attorney for said Plaintiff in Error.
ELIZABETH B. TUCKER AND
SAMUEL J. TUCKER,
Defendants in Error,
By FRANK B. STEPHENS,
BENNER X. SMITH,
Their Attorneys.

Dated November 10th, 1894.

39 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the Territory of Utah, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, between Salt Lake City and Elizabeth B. Tucker and Samuel J. Tucker, a manifest error hath happened, to the great damage of the said Salt Lake City, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington,

within 60 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the Supreme Court of the United States.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the tenth day of October, in the year of our Lord one thousand eighthundred and ninety-four.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

40 UNITED STATES OF AMERICA, *ss:*

To Elizabeth B. Tucker and Samuel J. Tucker, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Utah wherein Salt Lake City is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this tenth day of October, in the year of our Lord one thousand eight hundred and ninety-four.

DAVID J. BREWER,
Associate Justice of the Supreme Court U. S.

On this 15th day of October, in the year of our Lord one thousand eight hundred and ninety-four, personally appeared before me, the subscriber, H. W. Griffith, and makes oath that he delivered a true copy of the within citation to Frank B. Stephens and Benner X. Smith, attorneys for Elizabeth B. Tucker & Samuel J. Tucker.

H. W. GRIFFITH.

Sworn to and subscribed the 15th day of October, A. D. 1894.

[Seal Supreme Court, Territory of Utah, United States of America.]

JOSEPH P. BACHE,
Clerk Supreme Court of Utah Territory.

[Endorsed:] Filed in the supreme court, Oct. 15, 1894, at Salt Lake City, Utah. Joseph P. Bache, clerk.

41 The Supreme Court of the United States.

ELIZABETH B. TUCKER and SAMUEL J. TUCKER, Defendants in Error,
against
SALT LAKE CITY, Plaintiff in Error.

Now comes Salt Lake City, the plaintiff in error herein, by its attorney, and shows to the court that manifest error has been committed by the supreme court of the Territory of Utah in affirming the judgment of the district court of the third judicial district of Utah Territory herein, and assign- the following as the particular errors upon which plaintiff in error relies for a reversal of the judgment:

1.

The said supreme court of the Territory of Utah erred in affirming the judgment of the third judicial district court herein for the reason said trial court erred in receiving, and causing it to be filed and entered over and against the objection of the plaintiff in error, the pretended verdict of a part of the jury in this case, said verdict being concurred in by only nine of the twelve jurors sworn to try the case, and non-concurred in by three of the jurors in said case.

2.

The supreme court of Utah Territory erred in affirming the judgment of the third judicial district court of said Territory of Utah herein for the reason that said trial or district court erred and had no power or authority to cause or order a judgment to be entered in said court in favor of plaintiff therein, defendant in error herein, and against defendant therein, plaintiff in error herein, based upon the pretended verdict of nine of the twelve persons empanelled to try said case, the said verdict not being authorized or justified by any valid law, and was therefor- void.

42 Wherefor-, on account of the errors of the supreme court of the Territory of Utah above assigned and set forth, plaintiff in error, Salt Lake City, prays that said errors may be corrected, that the judgment of said court be reversed, that this cause be remanded to the supreme court of the Territory of Utah, with instructions to set aside the judgment of the said third judicial district court, and to return said cause to said trial court for a new trial of the same.

E. D. HOGE,
Attorney for Plaintiff in Error, Salt Lake City.

43 [Endorsed:] Elizabeth B. Tucker and Samuel J. Tucker, def't- in error, against Salt Lake City, plaintiff in error. Assignment of errors. Filed in the supreme court, Oct. 15, 1894, at Salt Lake City, Utah. Joseph P. Bache, clerk.

44 Know all men by these presents that we, Salt Lake City, a municipal corporation of the Territory of Utah, plaintiff in error, as principal, and —— ——, as sureties, are held and firmly

bound unto Elizabeth B. Tucker and Samuel J. Tucker, defendants in error, in the full and just sum of five thousand dollars, to be paid to the said Elizabeth B. Tucker and Samuel J. Tucker, their or either of their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of June, in the year of our Lord one thousand eight hundred and ninety-four.

Whereas lately, at a term of the supreme court of the Territory of Utah, in a suit depending in said court between Elizabeth B. Tucker and Samuel J. Tucker, defendants in error, and Salt Lake City, plaintiff in error, a judgment was rendered against the said Salt Lake City, plaintiff in error, and the said Salt Lake City having obtained writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Elizabeth B. Tucker and Samuel J. Tucker, defendants in error, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington within 60 days from the date thereof:

Now, the condition of the above obligation is such that if the said Salt Lake City, plaintiff in error, shall prosecute its writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

SALT LAKE CITY CORPORATION,
By R. N. BASKIN, *Mayor.* [SEAL.]
W. S. McCORNICK. [SEAL.]
JOHN E. DOOLY. [SEAL.]

Sealed and delivered in presence of—

——— ———.

Approved by—
DAVID J. BREWER, *Justice.*

45 UNITED STATES OF AMERICA, } ss:
Territory of Utah, }

In obedience to the command of the within writ, I herewith transmit to the honorable Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled cause, together with all things concerning the same.

Witness my hand and seal of said supreme court, at Salt Lake City, in said Territory, this 17th day of November, 1894.

[Seal Supreme Court, Territory of Utah, United States of America.]

JOSEPH P. BACHE,
Clerk Supreme Court of Utah.

Endorsed on cover: Case No. 15,746. Utah Territory supreme court. Term No., 199. Salt Lake City, plaintiff in error, *vs.* Elizabeth B. Tucker and Samuel J. Tucker. Filed December 10, 1894.

166-707

166-707

DEC 21 1896
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 199.

SALT LAKE CITY, PLAINTIFF IN ERROR,

vs.

ELIZABETH B. TUCKER AND SAMUEL J. TUCKER,
DEFENDANTS IN ERROR.

Appeal from the Supreme Court of the Territory of Utah.

BRIEF FOR PLAINTIFF IN ERROR.

WILLIAM McKAY,
Attorney for Plaintiff in Error.

D. B. HEMPSTEAD,
Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES.

SALT LAKE CITY, PLAINTIFF IN ERROR,

vs.

ELIZABETH B. TUCKER AND SAMUEL J. TUCKER,
DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

This action was brought by the defendants in error (the plaintiffs below) against Salt Lake City, in the Third Judicial District Court of Utah Territory, to recover damages for personal injuries alleged to have been caused by the negligence of the City in failing to keep in repair a sidewalk. The case was tried before the Court and a jury composed of twelve jurors, and on the 20th day of May, 1893, the jury returned into Court and say they find and present the following verdict by nine jurors, to-wit:

In the District Court of the Third Judicial District, Territory of Utah, County of Salt Lake.

ELIZABETH B. TUCKER et al., Plaintiffs,
vs.
SALT LAKE CITY, Defendant.
} VERDICT.

We, the jurors impaneled in the above case, find the issues for the plaintiff and assess the damages at the sum of two thousand dollars ($2,000.00).

EDWARD A. VISSER,
L. T. SHURTLIFF,
JOHN CHALMER,
J. H. TYLER,
H. ANDERSON.
JAMES ASHMAN,
WILLIAM J. CROWTHER,
JOHN T. LYNCH.
C. M. HAMMOND,

C. M. HAMMOND, Foreman.

Dated May 20, 1893.
Filed May 20, 1893.

HENRY G. MCMILLAN, Clerk.

(See Trans. of Rec., pages 4–5.)

At the time the foregoing verdict was presented, Salt Lake City, by its counsel, objected to receiving the verdict of nine jurors; but the Court overruled said objection and received said verdict and caused the same to be entered in this cause, to which action of the Court Salt Lake City, by its counsel, duly excepted.

(See Trans. of Rec., pages 4, 5, 6,)

Thereupon the following judgment was entered by the court:

District Court of the Third Judicial District, Territory of Utah, County of Salt Lake.

ELIZABETH B. TUCKER and SAMUEL J. TUCKER, Plaintiffs,
vs.
SALT LAKE CITY, a Corporation of Utah Ty., Defendant.

JUDGMENT ON VERDICT.

This action came on regularly for trial. The said parties appeared by their attorneys. A jury of twelve persons was regularly impaneled and sworn to try said action. Witnesses on the part of plaintiff and defendant were sworn and examined. After hearing evidence, the argument of counsel, and instructions of the Court, the jury retired to consider of their verdict, and subsequently returned into court, and being called, answered to their names and say, they find a verdict for the plaintiff as follows, to-wit:

We, the jurors impaneled in the above case, find the issues for the plaintiff and assess his damages at the sum of two thousand dollars ($2,000.00).

EDWARD A. VISSER. C. M. HAMMOND, Foreman.
H. T. SHURTLIFF, JOHN CHALMERS,
H. ANDERSON, R. H. TAYLOR,
JAMES ASHMAN, WILLIAM J. CROWTHER,
JOHN T. LYNCH, and C. M. HAMMOND.

Dated May 20, 1893.

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged, and decreed that said plaintiff have and recover from said defendant the sum of two thousand dollars, with interest thereon, at the rate of eight per cent. per annum, from the date hereof till paid, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of ninety-five and thirty-five hundredths dollars.

Judgment entered May 20th, A. D. 1893.

Endorsed: No. 10750. Title, court and cause. Judgment on verdict. Filed May 20th, 1893. Henry G. McMillan, clerk, by Geo. D. Loomis deputy.

(See Trans. of Rec., pages 5 and 6.)

Thereafter Salt Lake City by its attorneys duly moved the said court for a new trial in the said action, which motion was on the fourth day of November, 1893, overruled by the said court, and to which the said Salt Lake City, by its cousel duly excepted.

(See Trans. of Rec., page 8.)

An appeal was thereupon duly taken to the Supreme Court of Utah Territory, which Court sustained the judgment of the trial court.

(See Trans. of Rec., pages 14-17.)

ASSIGNMENTS OF ERROR.

The plaintiff in error makes the following assignments of error:

I.

The said Supreme Court of the Territory of Utah erred in affirming the judgment of the Third Judicial District Court herein for the reason said trial court erred in receiving, and causing it to be filed and entered over and against the objection of the plaintiff in error, the pretended verdict of a part of the jury in this case, said verdict being concurred in by only nine of the twelve jurors sworn to try the case, and non-concurred in by three of the jurors in said case.

II.

The Supreme Court of Utah Territory erred in affirming the judgment of the Third Judicial District Court of said Territory of Utah herein for the reason that said trial or district court erred and had no power or authority to cause or order a judgment to be entered in said court in favor of plaintiff therein, defendant in error herein, and against defendant therein, plaintiff in error herein, based upon the pretented verdict of nine of the the twelve persons empaneled to try said case, the said verdict not being authorized or justified by any valid law, and was therefore void.

(See Trans. of Rec., page 19.)

ARGUMENT.

There is but one error assigned and relied upon by the plaintiff in error for a reversal of the judgment; that contained in the assignment of errors, page 19, Transcript of Record, namely, that the verdict was not unanimous, being concurred in by only nine of the twelve jurors. The discussion of error involves the construction or interpretation of an Act of the Governor and Legislative Assembly of Utah Territory, approved March 10th, 1892,

Laws of Utah, 1892, p. 46, and is as follows:

"CHAPTER XLIV.

"Trial by Jury.

"An Act to Amend Section 3371 of the Compiled Laws of 1888, of the Territory of Utah, in regard to Trial by Jury.

"Be it enacted by the Governor and Legislative Assembly of the Territory of Utah:

"Section 1. That section 3371 of the Compiled Laws of 1888, of Utah, is hereby amended so as to read as follows:

"Section 3371. In all civil cases a verdict may be rendered on the concurrence therein of nine or more members of the jury. When the jury have agreed upon their verdict they must be conducted into court by their foreman. The verdict must be in writing and signed by their foreman if he is a concurring juror, and if he is

not a concurring juror it must be signed by all concurring members and be read by the clerk to the jury, and the inquiry made whether it is their verdict, and the answer may be made by any juror signing the verdict. If more than three jurors dissent, they must be sent out again, but if not more than three jurors dissent, and neither party requires the jury to be polled, the verdict is complete and the jury discharged from the case. Either party may require the jury to be polled, which shall be done by the judge or clerk asking each juror if it is his verdict. If more than three answer in the negative the jury must again be sent out.

"Approved March 10, 1892."

Said section 3371 is as follows:—Compiled Laws of Utah, Vol. II, 1888:—

"Sec. 3371. When the jury have agreed upon their verdict, they must be conducted into court, their names called by the clerk, and the verdict rendered by their foreman. The verdict must be in writing, signed by the foreman, and must be read by the clerk to the jury, and the inquiry made whether it is their verdict. If any juror disagrees, they must be sent out again; but if no disagreement be expressed, and neither party requires the jury to be polled, the verdict is complete and the jury discharged from the case. Either party may require the jury to be polled, which is done by the court or clerk asking each juror if it is his verdict. If any

one answer in the negative, the jury must again be sent out."

Article VII, Amendments to the Constitution of the United States, is as follows:

"In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

Section 17, Organic Act of Utah Territory, provides:

"That the Constitution and laws of the United States are hereby extended over and declared to be in force in said Territory of Utah, so far as the same or any provision thereof may be applicable."

FIRST.—This court has jurisdiction of this case without regard to the amount involved, if there be drawn in question the validity of an authority exercised under the United States, whether the decision of the lower court was for or against the authority.

Baltimore & Potomac Ry. Co. vs. Hopkins, 130 U. S., 210.

Clayton vs. Utah, 132 U. S., 632.

Clough vs. Curtis, 134 U. S., 361.

SECOND.—By the Constitution of the United States and the 17th section of the Organic Act a petit jury in a trial of an action at law, in the Territory of Utah, must consist of twelve men properly qualified. The aforesaid Act of the Governor and Legislative Assembly was unconstitutional and void; therefore the judgment of the lower court in this case should be reversed, and the cause remanded.

In support of this position we cite:

Opinion of the Justices, 41 N. H., 550.

5 Smedes Marshall, 682.

13 N. Y. Appeals, 425.

11 Nev., 59.

Kleinschmidt vs. Dunphy, 1 Mont., 118.

Aylesworth vs. Reece, 1 Mont., 200.

Bradford vs. Territory, (Okla.) 34 Pac. Rep., 66.

Carroll vs. Byers, et al, (Ariz.) 36 Pac. Rep., 499.

Anderson vs. Caldwell, 91 Ind., 454.

Haynes vs. Levin, 51 Pa. State, 414.

Cooley Con. Lim., (5th Ed.) 392-3.

Copp vs. Heinnaker, 55 N. H., 179.

Railroad Co. vs. Adams, 33 Fla., 608.

S. C. 24 L. R. A., 272 and note.

Cooley Con. Lim., 410, n. 2 and authorities there cited.

Sedgwick on Statutory and Con. Law, 547.

Mackey vs. Enzensperger, 11 Utah, 154, dissenting opinion of King, J.

We also call the Court's attention to case

No. 15584, Springville City vs. Perry A. Thomas,

and case

No. 15661, Salt Lake City Brewing Co. vs. Fred. W. Wolf Co., in this Court,

both of which have already been argued and submitted to the Court and involve precisely the same question as that involved in the present case.

It is respectfully submitted that the judgment of the lower court should be reversed.

WILLIAM McKAY,
Attorney for Plaintiff in Error.

D. B. HEMPSTEAD,
Of Counsel.

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166-707

Supreme Court, U.S.
FILED
JAN 27 1897
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

SALT LAKE CITY, *Plaintiff in Error,*

v.

ELIZABETH B. TUCKER and SAMUEL J. TUCKER, *Defendants in Error.*

No. 199.

In Error to the Supreme Court of the Territory of Utah.

Brief of Defendants in Error.

WM. T. S. CURTIS,
Attorney for Defendants in Error.

H. L. McQUEEN, PRINTER.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

SALT LAKE CITY, *Plaintiff in Error*,
v.
ELIZABETH B. TUCKER and SAMUEL J. TUCKER, *Defendants in Error*.
} No. 199.

In Error to the Supreme Court of the Territory of Utah.

Brief of Defendants in Error.

Statement of the Case.

This was an action instituted by the defendants in error, against the city of Salt Lake, in the Third Judicial District Court of Utah Territory, to recover damages for personal injuries received by reason of the negligence and carelessness of said city in failing to keep a certain sidewalk in proper repair.

At the trial of the cause, nine of the twelve jurors impaneled concurred in a verdict in favor of the defendants in error (the plaintiff below) and awarded them $2,000, together with interest and the costs of trial (R., pp. 4, 5, 11).

The verdict was as follows:

"IN THE DISTRICT COURT FOR THE THIRD JUDICIAL DISTRICT OF UTAH TERRITORY, SALT LAKE COUNTY.

ELIZABETH B. TUCKER, *et al.*
v.
SALT LAKE CITY.

"We, the jurors empaneled in the above case, find the issues for the plaintiff and assess her damages at the sum of two thousand dollars.

EDWARD A. VISSER, C. M. HAMMOND, Foreman,
H. T. SHURTLIFF, JOHN CHALMERS,
H. ANDERSON, R. H. TAYLOR,
JAMES ASHMAN, WILLIAM J. CROWTHER,
JOHN T. LYNCH.

Dated May 20, 1893."
(R., pp. 4, 5, 11.)

When the jury returned the above verdict, the defendant appears to have excepted *to the receiving of the verdict*, but beyond this, the record does not disclose that the validity of an authority exercised under the United States or the validity of the Act of March 10, 1892 (Session Laws of Utah, 1892, p. 46) or that the power of the District Court to enter judgment upon the above verdict, was brought to the attention of either the trial court or the Territorial Supreme Court.

The only exception or objection raised is in these words (R., p. 4):

"And the defendant excepts *to receiving the verdict* of nine jurors, and it is ordered that judgment be entered herein in favor of the plaintiff and against said defendant for said sum of $2,000, together with said plaintiff's costs herein incurred and taxed at $95.35."

Judgment having been entered on this verdict, the defendant filed a motion for new trial (R., p. 6).

An examination of said motion will disclose that the defendant did not raise any question or take any exception to the entry of judgment upon the verdict, or question the validity of the Territorial act of 1892. In his motion, the defendant relied entirely upon alleged errors assigned therein as to the introduction of certain evidence and to the instructions given to the jury, and it is to be presumed that all other questions not raised or discussed, either upon the motion for new trial or at the hearing upon the appeal before the Territorial Supreme Court, were waived (R., p. 12).

The motion for new trial having been argued and submitted, the court denied the same, whereupon the defendant appealed to the Supreme Court of the Territory (R., p. 8), which court in turn affirmed the action of the trial court (R., pp. 14–15).

Tucker *v.* Salt Lake City, 10 Utah, 173.

A writ of error sued out by the plaintiff in error brings the matter to this court.

The provision of the act of March 10, 1892, relating to jury trials, is in these words:

"Sec. 3371. In all *civil cases a verdict may be rendered on the concurrence therein of nine or more members of the jury.* When the jury have agreed upon their verdict they must be conducted into court by their foreman. The verdict must be in writing and signed by their foreman, if he is a concurring juror, and if he is not a concurring juror it must be signed by all concurring members and be read by the clerk to the jury, and the inquiry made whether it is their verdict, and the answer may be made by any juror signing the verdict. If more than than three jurors dissent and neither party requires the jury to be polled, the verdict is complete, and the jury discharged from the case. Either party may require the jury to be polled, which shall be done by the judge or clerk asking

each juror if it is his verdict. If more than three answer in the negative the jury must be again sent out."

(Session Laws of Utah, page 46.)

Since the trial of this case, Utah has been admitted into the Union as a State, and the following article of their constitution has been adopted:

"In capital cases the right of trial by jury shall remain inviolate. In courts of general jurisdiction, except in capital cases, a *jury shall consist of* EIGHT *jurors.* In courts of inferior jurisdiction a jury shall consist of four jurors. In criminal cases the verdict shall be unanimous. *In civil cases three-fourths of the jurors may find a verdict* A jury in civil cases shall be *waived unless demanded.*" (Italics mine.)

(Section 10 of Article 1, Utah Constitution.)

The following is also a provision of the laws of the new State (Act of 1896, Sec. 151, p. 567):

"If either party to any civil cause pending in the District Court shall desire a jury trial of the same, or of any issue or issues thereof, he shall, at or prior to the time of setting such cause for trial, or such other time as the court may by order direct, notify the clerk in writing that a jury is demanded, and shall at the same time deposit with the clerk the sum of five dollars. Whereupon it shall be the duty of the court to order jurors to be in attendance at the time set for the trial of the cause."

BRIEF.

In the assignment of errors (R., p. 19) only one question is raised by the plaintiff in error, viz: that the Supreme Court of the Territory erred in affirming the judgment of the District Court, based upon the verdict of nine concurring jurors.

All the questions urged before the District Court on the motion for new trial and before the Territorial Supreme Court on the appeal appear to have been waived.

At this term of the court there have been submitted for your consideration two cases very similar to the one at bar, but at the time of the preparation of this brief, they have not been decided.

Springville City *v.* Perry A. Thomas *et al.*, No. 103;

Salt Lake City Brewing Co. *v.* The Fred. W. Wolf Co., No. 153.

Should this court hold in said cases that the Territorial act of March 10, 1892, *supra*, is not violative of the provisions of the Seventh Amendment to the Constitution of the United States, or should hold that the writs of error should be dismissed for want of jurisdiction, it would necessarily follow that the action of the court below, in the case at bar, should be affirmed or the writ of error be dismissed.

The arguments that have been submitted in the above cases are so very full and exhaustive, and have been, no doubt, so fully considered by the court that I refrain from extending this brief to any great length, but I desire merely to submit several propositions demonstrating that in any event the plaintiff in error herein is without standing in this court, and that the writ of error should be dismissed.

I.

Questions not made on the trial or presented to the court below for its decision can not be entertained in this court on writ of error. It must appear affirmatively, from the record, that the question as to the validity of an authority exercised under the United States was drawn

in question and because the subject of *direct inquiry* in the District Court and before the Territorial Supreme Court.

It does not so appear and it is to be presumed that the objection was waived and that the defendant relied, for a reversal by the Supreme Court of the territory, upon the errors assigned in the statement on the motion for a new trial and appeal. *No objection was made to the entry of judgment upon the verdict.* The only objection that was made upon that point was to *receiving the verdict.* The question must have been actually raised and decided and it must so appear upon the face of the record. Counsel can not, for the first time, in this court rely upon points not raised in the court below where it must have been the subject of direct inquiry. It is not enough that the question might or should have been raised.

Linford *v.* Ellison, 155 U. S., 503;
Union Pac. R. Co. *v.* Myers, 115 U. S., 1;
Morrill *v.* Jones, 106 U. S., 466;
Davis *v.* Fredericks, 105 U. S., 4;
Wood *v.* Weimar, 104 U. S., 786;
The Victory, 6 Wall., 382;
Gibson *v.* Chauteau, 8 Wall., 314;
Lowndale *v.* Parrish, 21 How., 290;
Powell *v.* Brunswick Co., 150 U. S., 433.

We are to be governed by facts contained in the record and nothing can be considered upon a writ of error except what appears in the record.

Suydam *v.* Williamson, 20 How., 427;
Jennings *v.* Perseverence, 3 Dall., 336;
Arthurs *v.* Hart, 17 How., 6;
Storms *v.* United States, 94 U. S., 76.

II.

There is not drawn in question in this case the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision of the court below was *not against the validity* of either (Section 709, R. S.).

The mere fact that the validity of a Territorial Act may be drawn in question would not in itself draw in question the validity of a statute of or an authority exercised under the United States. The Supreme Court of Utah in all its rulings has uniformly held the act of 1892 to be a rightful subject of legislation within the legislative power of the Territory under the organic act. This being so, no question is presented for the review of this court.

Linford *v.* Ellison, 155 U. S., 503;
Miners' Bank *v.* State of Iowa, 12 How., 1;
Smith *v.* Adams, 130 U. S., 167;
Messenger *v.* Mason, 10 Wall., 507.

III.

The jury system provided for by the Territorial Act of 1892 was a subject properly within the legislative powers of the Territory conferred upon it by Congress, and as such it is not in conflict with or inconsistent with any provisions of the constitution or of the organic act.

In the case of Clinton *v.* Englebrecht, 13 Wall., 434, the court says *inter alia:*

"As there is no provision relating to the selection of jurors in the constitution or the organic act, it can not be said that any legislation upon this subject is inconsistent with either. The method of procuring jurors for the trial of cases is, therefore, a rightful subject of legislation, and the whole matter of selecting, impaneling and summoning jurors is left to the Territorial Legislature."

Organic Act of Utah, Sec. 6;
Mormon Church *v.* U. S., 136 U. S., 42–44;
Reynolds *v.* U. S., 98 U. S., 153;
National Bank *v.* Yankton, 101 U. S., 129;
The City of Panama, 101 U. S., 453–460.

IV.

The effect of the Seventh Amendment to the Constitution of the United States is to secure a jury trial in courts of the United States alone, and as the courts of the Territory of Utah are not United States courts, the said Seventh Amendment to the Constitution is not applicable.

In the case of McAllister *v.* United States (141 U. S., 174) this court held that the District Court for Alaska was not one of the "courts of the United States." The court says:

"It must be regarded as settled that courts in the Territories, created under the plenary municipal authority that Congress possesses over the Territories of the United States, are not courts of the United States."

To the same effect is the opinion of this court as to the courts of Washington Territory.

Wingard *v.* United States, 141 U. S., 201.

See also following cases:

American Ins. Co. *v.* 356 Bales of Cotton, 1 Pet., 511–546;
Benner *v.* Porter, 9 How., 235–242;
Clinton *v.* Englebrecht, 13 Wall., 434, 447;
Good *v.* Martin, 95 U. S., 90, 95;
The City of Panama, 101 U. S., 453–460.

V.

The Territorial Act of March, 10, 1892, authorizing a verdict by three-fourths of the jury, is not in conflict with

the spirit or meaning of the Seventh Amendment to the Constitution as intended by its framers.

Hess *v.* White, 9 Utah, 61.
Hurtado *v.* People, 110 U. S., 516.
Harvard Law Review, Vol. 5, p. 296.

In a large number of the States of the Union, as well as in Utah, as shown by the constitution and laws of the new State adopted and passed in 1896, *supra*, the legislatures have enacted laws providing that in civil proceedings unanimity in the verdict of the jury is not a prerequisite to its validity. Such legislation, as stated by the Supreme Court of Utah in Hess *v.* White, "is one of the signs of progress." It is but an expression of the public will of the people that the rule of the majority should prevail, as is the case in the proceedings in the courts and legislative bodies of our land, and should be upheld. If a majority of both houses of Congress is sufficient to secure the passage of a law which affects the interests and destinies of the whole people, then why may not a law providing that a majority (in this case three-fourths) of a jury be sufficient to determine a question of civil right between man and man.

The jury system was in its inception nothing but the testimony of witnesses informing the court of facts supposed to be within the personal knowledge of the jurymen, therefore the rule to require twelve men who act as witnesses to be unanimous was simply to fix the amount of evidence which the law deemed to be conclusive of a matter. Now that the jurors do not act as witnesses, the the question is, Whether the rule should be retained when the character of the tribunal has changed and the functions which it is to discharge are no longer the same as they were when the rule was adopted.

Mr. Hallam, in a note to his "Middle Ages," states that

the requirement of unanimity in the verdict of a jury is "a preposterous relic of barbarism." Christian, in his notes on Blackstone, remarks, that "the unanimity of twelve men, so repugnant to all experience of human conduct, passions and understandings, could hardly in any age have been introduced into practice by a deliberate act of the legislature, and it remains to be seen whether the legislature will much longer tolerate such an anomaly."

Under the present laws of the new State of Utah (Sec. 151, act of 1896) a verdict concurred in by only *six jurors*, two-thirds of a full panel of *eight jurors*, would be valid, while under the act of 1892 it required the concurrence of nine, at least, which was one juror more than a full panel under the present constitution and laws of Utah.

The reasoning of the Supreme Court of Utah in the case of Hess *v.* White (9 Utah, 61), holding that the jury act of 1892 is not unconstitutional, I submit is sound, and should be upheld and the judgment herein be affirmed upon the merits.

Again under the act of March 3, 1885, 23 Stats. at Large, 443, the writ of error should be dismissed, because—

The matter in dispute does not exceed $5,000, the judgment being for $2,000, besides interest and costs (R., p. 12), and for further reason, as above stated, there is not drawn in question the validity of any statute of, or authority exercised under, the United States.

Respectfully submitted.

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